

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL'S REPORT**
4

5 MUR: 7211
6 DATE COMPLAINT FILED: January 13, 2017
7 DATE OF NOTIFICATION: January 24, 2017
8 LAST RESPONSE RECEIVED: None
9 DATE OF ACTIVATION: May 9, 2017
10
11 ELECTION CYCLE: 2012
12 EXPIRATION OF SOL: Earliest: August 27, 2017
13 Latest: November 7, 2017
14

15 **COMPLAINANT:** Loren Collins

16
17 **RESPONDENTS:** Thomas H. Patrick

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19 **RELEVANT STATUTES
20 AND REGULATIONS:**

21 52 U.S.C. § 30101
22 52 U.S.C. § 30103(a)
23 52 U.S.C. § 30104
24 52 U.S.C. § 30120
25 11 C.F.R. § 100.11
26 11 C.F.R. § 100.22
27 11 C.F.R. § 100.26
28 11 C.F.R. § 100.27
29 11 C.F.R. § 110.11
30

31 **INTERNAL REPORTS CHECKED:** Disclosure Reports

32 **FEDERAL AGENCIES CHECKED:** None
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34 **I. INTRODUCTION**

35 The Complaint in this matter alleges that Thomas H. Patrick violated 52 U.S.C.
36 §§ 30104(c) and 30120 of the Federal Election Campaign Act of 1971, as amended, (the "Act")
37 by failing to report independent expenditures for, and failing to include appropriate disclaimers
38 on, a mailing sent to 10,145 registered voters in August 2012. The mailing expressly advocated
39 the defeat of then-President Barack Obama and the election of Mitt Romney in the 2012

1 presidential election and the election of Josh Mandel in the 2012 Ohio Senatorial election.¹
2 Respondent did not respond to the Complaint.

3 We recommend that the Commission find reason to believe that Thomas H. Patrick
4 violated 52 U.S.C. §§ 30104(c) and 30120, authorize pre-probable cause conciliation, and
5 approve the attached conciliation agreement.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Facts**

8 Complainant alleges that on or about August 27, 2012, Respondent sent a cover letter, a five-
9 page memorandum, printed exhibits, and a DVD of the movie *Dreams From My Real Father*² to all
10 voters in ZIP code 44425 (Hubbard, Ohio).³ The cover letter states that Respondent sent the materials to
11 the “10,145 registered voters” in that ZIP code.⁴ The cover letter criticizes President Obama and states
12 that the material is being provided to seek “support for conservative free market candidates this
13 November.” The last paragraph of the letter states, “I ask that you cast your vote based on careful
14 analysis rather than routine party loyalty.”⁵ It concludes, “[t]he coming election is unlike any we have
15 ever faced. Please take time to understand who Obama really is and where he intends to take the United
16 States. . . . [c]areful analysis will lead you to the conclusion that he is intent on destroying much of what
17 you hold dear.”⁶

¹ Compl. at 7-8 (Oct. 20, 2016).

² *Id.* at Ex. 1. *Dreams From My Real Father* was made available for purchase online in July 2012. See MUR 6779 (Gilbert) FGCR (reciting history of the production and distribution of the *Dreams* DVD).

³ The Complaint misidentifies the target audience as living in Hubbard, Illinois, but the content of the mailer makes it clear that it was sent to registered voters in Hubbard, Ohio.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.*

1 The five-page memorandum attached to the cover letter advocates against the re-election of
2 Obama and for the election of Romney and Mandel.⁷ The memorandum criticizes Obama's policies and
3 "calls for committed action to *defeat Obama*. Ohio is a pivotal state and our personal efforts could
4 swing the election."⁸ The memorandum closes by stating, "It is my hope that you will *join me in this*
5 *effort to support not only Gov. Romney but also. . . Josh Mandel, the Republican senatorial candidate in*
6 *Ohio. . .*"⁹

7 Complainant alleges that a DVD of the movie, *Dreams From My Real Father*, was attached to
8 the cover letter and memorandum.¹⁰ The 95-minute film purports to tell the "true" history of Obama's
9 parentage and biographical background in the style of a documentary.¹¹ Complainant contends that the
10 film uses false information and conspiracy theories to attack Obama's character and credibility, and was
11 produced and distributed in an effort to defeat Obama in the 2012 Presidential election.¹²

12 Complainant contends that because the DVD is sold on various websites for \$14.95, Respondent
13 potentially spent over \$150,000 for this mailer,¹³ but did not report the mailer as an independent
14 expenditure, nor did he include the required disclaimer.

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⁷ Compl., Ex. 1.

⁸ *Id.*

⁹ *Id.* (emphasis added).

¹⁰ Compl. at 3, Ex. 2; Supp. Compl., Ex. 1.

¹¹ *Id.* at 3-4.

¹² Compl. at 3-4.

¹³ *Id.* at 4, Exs. 2, 5.

CONFIDENTIAL

1 **B. Analysis**

2 **1. Failure to Report Independent Expenditures**

3 The Act defines “expenditure” as “any purchase, payment, distribution, loan, advance,
4 deposit, or gift of money or anything of value made by any person for the purpose of influencing
5 any election for Federal office.”¹⁴ An “independent expenditure” is an expenditure by a person
6 expressly advocating the election or defeat of a clearly identified federal candidate that is not
7 made in concert or cooperation with or at the request or suggestion of such candidate, the
8 candidate’s authorized political committee, or their agents, or a political party committee or its
9 agents.¹⁵ Every person, other than a political committee, who makes independent expenditures
10 over \$250 in a calendar year must disclose those expenditures in reports to the Commission.¹⁶

11 In determining whether a communication contains express advocacy, the Commission
12 analyzes the message under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R.
13 § 100.22(b).¹⁷ Here, the mailer expressly advocated Obama’s defeat and Romney’s and
14 Mandel’s election under 11.C.F.R. § 100.22(a).

15 A communication expressly advocates the election or defeat of a clearly identified federal
16 candidate under Section 100.22(a) if it uses phrases including, but not limited to, “Support the
17 Democratic nominee” and “vote against Old Hickory” or “‘defeat’ accompanied by a picture of
18 one or more candidates,” or “reject the incumbent,” or “communications of campaign slogan(s)
19 or individual word(s), which in context can have no other reasonable meaning than to urge the

¹⁴ 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111.

¹⁵ 52 U.S.C. § 30101(17).

¹⁶ 52 U.S.C. § 30104 (b)(3)(A), (c)(1).

¹⁷ Political Committee Status, 72 Fed. Reg. at 5595, 5606 (Feb. 7, 2007) (“PC Status E&J”).

1 election or defeat of one or more clearly identified candidates such as posters, bumper stickers,
2 advertisements, etc., which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or
3 'Mondale!'"¹⁸ Express advocacy also encompasses a communication that contains "in effect an
4 explicit directive" to vote for or against a candidate.¹⁹ The fact that this message is marginally
5 less direct than "Vote for Smith" does not change its essential nature.²⁰

6 Respondent's memorandum contains statements that expressly advocated Obama's defeat
7 and Romney's and Mandel's elections:

- 8 • Conclusion - calls for committed action to *defeat Obama*. Ohio is a pivotal state
9 and our personal efforts could swing the election.²¹
- 10 • It is my hope that you will join me in this effort and *support not only Gov.*
11 *Romney but also others, particularly, Josh Mandel, the Republican senatorial*
12 *candidate in Ohio[.]*²²

13 Both of these statements explicitly call for the defeat or election of a federal candidate.

14 Accordingly, the mailer contains Section 100.22(a) express advocacy.²³

15 Because Respondent's communication contained express advocacy, it is an independent
16 expenditure, and the available information strongly indicates that it exceeded the \$250 reporting

¹⁸ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as "Smith for Congress" and "Bill McKay in '94," have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995) ("EA E&J").

¹⁹ *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates) ("MCFL").

²⁰ *See MCFL*, 479 U.S. at 249.

²¹ Compl., Ex. 1 at 1. (emphasis added).

²² *Id.* at 6 (emphasis added).

²³ *See MCFL*, 479 U.S. at 249. In addition to satisfying the test for express advocacy under 100.22(a), certain portions of the communication likely satisfy the standard for express advocacy under 100.22(b). However, because the communication clearly satisfies 100.22(a), it is unnecessary to analyze it under 100.22(b) to make reason to believe findings in this particular case.

1 threshold. The cover letter states Respondent mailed it to 10,145 registered voters in Hubbard,
2 Ohio.²⁴ Given the cost of postage, the DVDs (reportedly \$14.95 per copy), and mailing
3 materials for 10,145 packages, Respondent almost certainly spent more than \$250 on the mailer.
4 Thus, Respondent was required, but failed, to report his independent expenditures to the
5 Commission. Thus, we recommend the Commission find reason to believe that Thomas H.
6 Patrick violated 52 U.S.C. § 30104(c).

7 **2. Missing Disclaimer**

8 The Act requires disclaimers identifying the person who paid for any public
9 communication that expressly advocates the election or defeat of a clearly identified federal
10 candidate.²⁵ "Public communications" include "mass mailings," which are mailings of more
11 than 500 pieces of mail of an identical or substantially similar nature within any 30-day
12 period."²⁶

13 The disclaimer must be "presented in a clear and conspicuous manner, to give the reader,
14 observer, or listener adequate notice of the identity of the person or political committee that paid
15 for, and where required, that authorized the communication."²⁷ If a communication is paid for
16 by a person or entity other than a candidate's authorized committee, but authorized by a
17 candidate, the candidate's authorized committee, or an agent of either, the communication must
18 clearly state that it has been paid for by such other persons and authorized by the candidate's

²⁴ Compl., Exs. 1, 5.

²⁵ 52 U.S.C. § 30120(a)(2); 11 C.F.R. § 110.11(a)-(c). 52

²⁶ U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

²⁷ 11 C.F.R. § 110.11(c).

1 authorized political committee.²⁸ If a communication is not authorized by candidate's authorized
2 committee, it must clearly state the name and permanent address, telephone number or website
3 address of the person who paid for the communication and state that the communication is not
4 authorized by any candidate or candidate's committee.²⁹ For printed communications,
5 disclaimers must be clear and conspicuous, be of sufficient type size to be clearly readable, be
6 contained in a printed box set apart from the other contents of the communication, and must
7 clearly state who paid for the communication.³⁰

8 The available information supports the conclusion that Respondent's mailers are mass
9 mailings, and thus, public communications. The cover letter states Respondent sent the mailer to
10 over 10,145 registered voters, making it a mass mailing. Because the mailers contained express
11 advocacy—see Section II.B.1—they required disclaimers. Respondent failed to include a
12 disclaimer of any kind in the cover letter, the attached memorandum, or the DVD.

13 Accordingly, we recommend that the Commission find reason to believe that Thomas H.
14 Patrick violated 52 U.S.C. § 30120 by failing to include proper disclaimers in his public
15 communication.

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²⁸ 11 C.F.R. § 110.11(b)(2).

²⁹ 11 C.F.R. § 110.11(b)(3).

³⁰ 11 C.F.R. § 110.11(c)(2).

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INFORMATION

IV. RECOMMENDATIONS

1. Find reason to believe that Thomas H. Patrick violated 52 U.S.C. § 30104(c) by failing to disclose independent expenditures;
2. Find reason to believe that Thomas H. Patrick violated 52 U.S.C. § 30120 by failing to use proper disclaimers in his public communications;
3. Approve the attached Factual and Legal Analysis;
4. Enter into conciliation with Thomas H. Patrick prior to a finding of probable cause to believe;
5. Approve the attached Conciliation Agreement; and

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENT: Thomas H. Patrick MUR 7211
4

5 **I. INTRODUCTION**

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7 §§ 30104(c) and 30120 of the Federal Election Campaign Act of 1971, as amended, (the “Act”)
8 by failing to report independent expenditures for, and failing to include appropriate disclaimers
9 on, a mailing sent to 10,145 registered voters in August 2012. The mailing expressly advocated
10 the defeat of then-President Barack Obama and the election of Mitt Romney in the 2012
11 presidential election and the election of Josh Mandel in the 2012 Ohio Senatorial election.¹
12 Respondent did not respond to the Complaint.

13 The Commission finds reason to believe that Thomas H. Patrick violated 52 U.S.C.
14 §§ 30104(c) and 30120.

15 **II. FACTUAL AND LEGAL ANALYSIS**

16 **A. Facts**

17 Complainant alleges that on or about August 27, 2012, Respondent sent a cover letter, a five-
18 page memorandum, printed exhibits, and a DVD of the movie *Dreams From My Real Father*² to all
19 voters in ZIP code 44425 (Hubbard, Ohio).³ The cover letter states that Respondent sent the materials to
20 the “10,145 registered voters” in that ZIP code.⁴ The cover letter criticizes President Obama and states

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³ The Complaint misidentifies the target audience as living in Hubbard, Illinois, but the content of the mailer makes it clear that it was sent to registered voters in Hubbard, Ohio.

⁴ *Id.*

1 that the material is being provided to seek “support for conservative free market candidates this
2 November.” The last paragraph of the letter states, “I ask that you cast your vote based on careful
3 analysis rather than routine party loyalty.”⁵ It concludes, “[t]he coming election is unlike any we have
4 ever faced. Please take time to understand who Obama really is and where he intends to take the United
5 States. . . . [c]areful analysis will lead you to the conclusion that he is intent on destroying much of what
6 you hold dear.”⁶

7 The five-page memorandum attached to the cover letter advocates against the re-election of
8 Obama and for the election of Romney and Mandel.⁷ The memorandum criticizes Obama’s policies and
9 “calls for committed action to *defeat Obama*. Ohio is a pivotal state and our personal efforts could
10 swing the election.”⁸ The memorandum closes by stating, “It is my hope that you will *join me in this*
11 *effort to support not only Gov. Romney but also. . . Josh Mandel, the Republican senatorial candidate in*
12 *Ohio....*”⁹

13 Complainant alleges that a DVD of the movie, *Dreams From My Real Father*, was attached to
14 the cover letter and memorandum.¹⁰ The 95-minute film purports to tell the “true” history of Obama’s
15 parentage and biographical background in the style of a documentary.¹¹ Complainant contends that the

⁵ *Id.* at 4.

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⁷ Compl., Ex. 1.

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1 film uses false information and conspiracy theories to attack Obama's character and credibility, and was
2 produced and distributed in an effort to defeat Obama in the 2012 Presidential election.¹²

3 Complainant contends that because the DVD is sold on various websites for \$14.95, Respondent
4 potentially spent over \$150,000 for this mailer,¹³ but did not report the mailer as an independent
5 expenditure, nor did he include the required disclaimer.

6 **B. Analysis**

7 **1. Failure to Report Independent Expenditures**

8 The Act defines "expenditure" as "any purchase, payment, distribution, loan, advance,
9 deposit, or gift of money or anything of value made by any person for the purpose of influencing
10 any election for Federal office."¹⁴ An "independent expenditure" is an expenditure by a person
11 expressly advocating the election or defeat of a clearly identified federal candidate that is not
12 made in concert or cooperation with or at the request or suggestion of such candidate, the
13 candidate's authorized political committee, or their agents, or a political party committee or its
14 agents.¹⁵ Every person, other than a political committee, who makes independent expenditures
15 over \$250 in a calendar year must disclose those expenditures in reports to the Commission.¹⁶

16 In determining whether a communication contains express advocacy, the Commission
17 analyzes the message under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R.

¹² Compl. at 3-4.

¹³ *Id.* at 4, Exs. 2, 5.

¹⁴ 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.11.

¹⁵ 52 U.S.C. § 30101(17).

¹⁶ 52 U.S.C. § 30104 (b)(3)(A), (c)(1).

1 § 100.22(b).¹⁷ Here, the mailer expressly advocated Obama's defeat and Romney's and
2 Mandel's election under 11 C.F.R. § 100.22(a).

3 A communication expressly advocates the election or defeat of a clearly identified federal
4 candidate under Section 100.22(a) if it uses phrases including, but not limited to, "Support the
5 Democratic nominee" and "vote against Old Hickory" or "'defeat' accompanied by a picture of
6 one or more candidates," or "reject the incumbent," or "communications of campaign slogan(s)
7 or individual word(s), which in context can have no other reasonable meaning than to urge the
8 election or defeat of one or more clearly identified candidates such as posters, bumper stickers,
9 advertisements, etc., which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or
10 'Mondale!'"¹⁸ Express advocacy also encompasses a communication that contains "in effect an
11 explicit directive" to vote for or against a candidate.¹⁹ The fact that this message is marginally
12 less direct than "Vote for Smith" does not change its essential nature.²⁰

13 Respondent's memorandum contains statements that expressly advocated Obama's defeat
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16 and our personal efforts could swing the election.²¹

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²⁰ See *MCFL*, 479 U.S. at 249.

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- 1 • It is my hope that you will join me in this effort and *support not only Gov.*
2 *Romney but also others, particularly, Josh Mandel, the Republican senatorial*
3 *candidate in Ohio[.]*²²

4 Both of these statements explicitly calls for the defeat or election of a federal candidate.

5 Accordingly, the mailer contains Section 100.22(a) express advocacy.²³

6 Because Respondent's communication contained express advocacy, it is an independent
7 expenditure, and the available information strongly indicates that it exceeded the \$250 reporting
8 threshold. The cover letter states Respondent mailed it to 10,145 registered voters in Hubbard,
9 Ohio.²⁴ Given the cost of postage, the DVDs (reportedly \$14.95 per copy), and mailing
10 materials for 10,145 packages, Respondent almost certainly spent more than \$250 on the mailer.
11 Thus, Respondent was required, but failed, to report his independent expenditures to the
12 Commission. Therefore, the Commission finds reason to believe that Thomas H. Patrick
13 violated 52 U.S.C. § 30104(c).

14 2. Missing Disclaimer

15 The Act requires disclaimers identifying the person who paid for any public
16 communication that expressly advocates the election or defeat of a clearly identified federal
17 candidate.²⁵ "Public communications" include "mass mailings," which are mailings of more

²² *Id.* at 6 (emphasis added).

²³ *See MCFL*, 479 U.S. at 249. In addition to satisfying the test for express advocacy under 100.22(a), certain portions of the communication likely satisfy the standard for express advocacy under 100.22(b). However, because the communication clearly satisfies 100.22(a), it is unnecessary to analyze it under 100.22(b) to make reason to believe findings in this particular case.

²⁴ Compl., Exs. 1, 5.

²⁵ 52 U.S.C. § 30120(a)(2); 11 C.F.R. § 110.11(a)-(c).

1 than 500 pieces of mail of an identical or substantially similar nature within any 30-day
2 period.”²⁶

3 The disclaimer must be “presented in a clear and conspicuous manner, to give the reader,
4 observer, or listener adequate notice of the identity of the person or political committee that paid
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7 candidate, the candidate’s authorized committee, or an agent of either, the communication must
8 clearly state that it has been paid for by such other persons and authorized by the candidate’s
9 authorized political committee.²⁸ If a communication is not authorized by candidate’s authorized
10 committee, it must clearly state the name and permanent address, telephone number or website
11 address of the person who paid for the communication and state that the communication is not
12 authorized by any candidate or candidate’s committee.²⁹ For printed communications,
13 disclaimers must be clear and conspicuous, be of sufficient type size to be clearly readable, be
14 contained in a printed box set apart from the other contents of the communication, and must
15 clearly state who paid for the communication.³⁰

16 The available information supports the conclusion that Respondent’s mailers are mass
17 mailings, and thus, public communications. The cover letter states Respondent sent the mailer to
18 over 10,145 registered voters, making it a mass mailing. Because the mailers contained express

²⁶ 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

²⁷ 11 C.F.R. § 110.11(c).

²⁸ 11 C.F.R. § 110.11(b)(2).

²⁹ 11 C.F.R. § 110.11(b)(3).

³⁰ 11 C.F.R. § 110.11(c)(2).

1 advocacy—see Section II.B.1—they required disclaimers. Respondent failed to include a
2 disclaimer of any kind in the cover letter, the attached memorandum, or the DVD.

3 Accordingly, the Commission finds reason to believe that Thomas H. Patrick violated
4 52 U.S.C. § 30120 by failing to include proper disclaimers in his public communication.

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